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No. 10-475

IN THE
Supreme Court of the United States

MAHENDER MURLIDHAR SABHNANI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner Mahender Murlidhar Sabhnani

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REPLY BRIEF FOR PETITIONER

The trial judge, the prosecutor, and defense counsel in this case *all* understood that petitioner was on trial for aiding and abetting his wife Varsha. Each also understood that the government's main theory as to petitioner was that he failed to intervene to halt his wife's abuse of two domestic servants. As far as the government was concerned, it could ask the jury to convict because human decency alone (apart from any external, independent legal duty) should have impelled petitioner to intervene. The Second Circuit rightly concluded that this theory of aiding-and-abetting is "dubious," and even the Solicitor General now concedes that the omissions theory could only be rendered correct by additional instructions that defined the source and scope of a legal duty to act—instructions that petitioner insisted were necessary. Yet, like the Second Circuit, the Solicitor General defends the convictions on the basis that the jury also received an *alternative* theory of aiding and abetting that was correct, even though this was not even the theory that the prosecutor primarily argued to the jury. This is flatly contrary to this Court's cases.

The issue here is not, as the Solicitor General would have it, whether jury instructions must be read as a whole. No one disagrees with that proposition, which in this case hurts rather than helps the government. The instructions "as a whole" show a classic error under *Yates v. United States*, 354 U.S. 298 (1957): the jury was given *alternative* theories to convict (affirmative acts *or* omissions) and one of those theories (omissions) is legally erroneous. The government must prove that this error is harmless

beyond a reasonable doubt on the basis of the entire record. *Skilling v. United States*, 130 S. Ct. 2896, 2934 (2010) (citing *Hedgpeth v. Pulido*, 555 U.S. 57 (2008) (per curiam)). The government has never suggested it can do so. Its argument instead is that the *alternative* instruction on affirmative acts was really, truly, honestly, cross-my-heart correct. This is a statement of the *Yates* problem, not its solution. The government's argument therefore rests not on the instructions "as a whole," but on the instructions as a half, and it depends ultimately on the proposition that the jurors were the only people in the courtroom who did not get wind of the government's primary theory of prosecution.

Because the jury was expressly permitted to convict on a theory that even the government now concedes was at least incomplete, the fact that they also had an alternative that was correct could only help the government if "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). But petitioner's convictions were affirmed without any reason to think the jury that heard the case actually found him guilty under the correct legal theory. This violates both due process and the Sixth Amendment. The error is particularly pernicious in this case, because the jury most likely convicted on the invalid theory presented by the instructions and the prosecutor's arguments, which essentially defined a common-law crime that left the key question of duty up to the individual sensibilities of the jurors. The decision below gives prosecutors and juries license to do something prohibited by 200 years of precedent: invent common law federal crimes. *See, e.g.*, *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812).

THIS COURT'S REVIEW IS NEEDED TO SAFEGUARD EXCEEDINGLY IMPORTANT REQUIREMENTS FOR HARMLESS-ERROR REVIEW AND AIDING-AND-ABETTING LIABILITY

1. The Solicitor General devotes the bulk of his brief to a detailed defense of the aiding-and-abetting instruction that was based on affirmative actions, but he can scarcely deny that the government deliberately built its case on a second theory under which petitioner could be found guilty of violating at least four separate federal laws because of *inactions*—*i.e.*, he did not intervene in his wife's abuse of domestic servants. It was the prosecutors' mantra from beginning to end that petitioner "had to know" what was happening, yet "didn't do anything" about it. *E.g.*, Pet. App. 127a-30a. Thus, after presenting proofs devoted to highlighting petitioner's inaction, the government requested an instruction tailored to those proofs, successfully fought off petitioner's strong objection to it during the Rule 30 charge conference, and urged the jury in summation to convict petitioner on that basis by itself. *Id.* at 121a-31a. None of this is disputed.

The government put nearly every egg in its failure-to-act basket because, as the Solicitor General's response makes clear, the evidence for inferring that petitioner *did* anything unlawful was paper-thin and vigorously contested. According to the two workers themselves (*see* Pet. 4), petitioner wasn't even present for the abuse they described, much less did he actively participate. Even the evidence of "acts" that the government now trots out—for example, "order[ing the women] to undertake various tasks" such as "cleaning the bathroom in his office" (Opp. 3)—

does little to suggest illegality, and it is scarcely surprising given that he believed his wife had hired them for domestic service. The government is therefore reduced to relying on a vaguely worded statement in the trial judge's sufficiency of evidence ruling—a source that is all the more curious given the judge's *ultimate* conclusion that "the jury found that [petitioner] aided and abetted in these crimes, *though he was not a participant at all*." Pet. App. 137a (emphasis added). To be sure, the trial court believed that the government also presented evidence of affirmative acts, but there is a world of difference between the judge's post-trial declaration that "this is *not only* a failure to act case" (Pet. App. 116a (emphasis added)), and the government's current litigating position that it was not a failure-to-act case *at all*.[1]

2. Calling the instructions "correct as a whole" cannot disguise the panel's sharp departure from this Court's precedents. The problem here is not one of ambiguity that was "clarified" by additional instructions. In particular, although the government makes much of instructions that focused on whether petitioner "participated" or "associate[ed]" himself in the venture (Opp. 6), these merely tracked the first paragraph of the aiding-and-abetting instructions and left untouched the key following paragraph, which told the jury that willful "participation" could

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[1] Indeed, the government's reliance on this ruling is puzzling because a court considering evidentiary sufficiency is concerned only with whether a properly instructed jury *could* rationally have convicted on the evidence presented. The problem here is that the jury was *not* properly instructed, which means the government must demonstrate that the jury *did* find guilt under a proper theory, not merely that it could have.

take the form of a failure to act when there was some undefined duty to do so. *See* Opp. 5; Pet. App. 134a-35a. As far as the jury knew, this omissions theory was a fully adequate basis for conviction.

The government can only defend the failure-to-act instruction by emphasizing the complete *absence* of the language needed to make it correct. This odd defense—under which the very error alleged turns out to be the basis for affirmance—posits that the jury could avoid "'any confusion'" (Opp. 13 (quoting Pet. App. 37a)) about this instruction by simply ignoring it. *See also* Pet. App. 33a-34a (panel calls instruction "not inaccurate," "but simply extraneous" because the *additional* instruction stating which legal theory might possibly support failure-to-act liability was "absent"). But "the crucial assumption underlying our constitutional system of trial by jury" is that "jurors carefully follow instructions," not ignore them. *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985). That assumption almost invariably redounds to the government's benefit. *See, e.g.*, *Richardson v. Marsh*, 481 U.S. 200 (1987) (citing cases). This is hardly the occasion to start assuming—contrary to settled law—that jurors instead follow only the instructions that happen to be correct. *See, e.g.*, *Griffin v. United States*, 502 U.S. 46, 59 (1991) ("Jurors are generally not equipped to determine whether a particular theory of conviction submitted to them is contrary to law."). In fact, one of the first things this jury heard after summations was: "You must follow all of the rules as I explain them to you. You may not follow some and ignore others." Trial Tr. 4994; *id.* (adding not to ignore any

parts, "[e]ven if you disagree or *don't understand* the reasons for some of the rules" (emphasis added)).[2]

The absence of further instructions defining duty was not some word-processing accident but the result of the government's strategy of intentionally withholding such instructions from the jury. As the government then saw it, the existence or contours of any duty was "a matter of law and not an issue that would be presented to the jury for resolution." Pet. App. 153a (also arguing that it was "not a factual issue" for which "the jury would have to render a verdict"). Of course, withholding elements of a crime from the jury is a textbook example of constitutional error. *See, e.g., Neder v. United States*, 527 U.S. 1, 10 (1999); *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995). Here, it allowed the jurors to believe that they had been given everything needed to convict for failing to act—a result that invited each juror to act on his or her individualized sense of moral outrage and violated over 200 years of precedent barring common law federal crimes. *See, e.g., Hudson, supra.*

The Second Circuit resolved these issues by emphasizing what no one disputes—that the jury *also* received a correct affirmative-acts instruction. As this court held in *Pulido*, this *could* allow the government to retain the conviction, but only by satisfy-

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[2] Calling the instruction literally "not inaccurate" makes a difference only if jurors know they can ignore a judge's decision to instruct them on the government's primary theory. Other circuits reject that proposition, recognizing that "even a facially correct instruction may, in the light of record proof" and "other circumstances of the case, be incomplete, misleading, confusing, or otherwise prejudicial." *United States v. Carney*, 387 F.3d 436, 449 (6th Cir. 2004).

ing the *Chapman* standard—*i.e.*, by showing, beyond a reasonable doubt, that *this* jury convicted on the proper basis. The Second Circuit did not do that; instead, it engaged in a truncated prejudice analysis that ignored the trial record and asked the wrong question. The court did not inquire whether the faulty instructions were "so confusing as to permit" *petitioner's* jury to convict for failure to act (Pet. App. 34a), but whether the instructions could have misled an imaginary jury that heard evidence and arguments *exclusively* devoted to aiding and abetting by affirmative acts. It thus affirmed the convictions even though there is no reason to think the jury that actually heard the case found petitioner guilty on a proper basis. An unbroken line of Sixth Amendment precedent bars appellate courts from upholding convictions on the supposition that a properly instructed jury could have (or even would have) reached the same verdict. *See California v. Roy*, 519 U.S. 2, 7 (1996) (Scalia & Ginsburg, JJ., concurring) (error "cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise," because "[t]o allow the error to be cured in that fashion would be to dispense with trial by jury"); *Rose v. Clark*, 478 U.S. 570, 578 (1986) ("the error in such a case is that the wrong entity judged the defendant guilty"); *Chapman v. California*, 386 U.S. 18, 25-26 (1967).

3. The more fundamental point is that speculation about the likelihood that jurors rejected a part of their instructions as superfluous can only be considered (if ever) as *a part* of—not *in place* of—traditional harmless error review. To be sure, a juror *could* have thought it plausible that the judge mistakenly said (and then repeated) that failures to act give rise to the *same* liability as affirmative acts,

when he really meant that only affirmative acts are unlawful. But in the eyes of a conscientious juror, the judge also could have meant that failure-to-act may take the place of "action" in the instructions. At least that way, a juror wouldn't run afoul of the one directive that applied to *the entirety* of her instructions: do not "follow some" instructions "and ignore others." And, not coincidentally, it would explain why the prosecutors spent so much time in summation emphasizing how the jury should use all of their failure-to-act proofs to convict petitioner. Pet. App. 127a-30a (emphasizing "he didn't do anything").[3]

Compounding the error of importing the prejudice assessment into its determination whether the instructions had the capacity to mislead, the appellate court artificially excluded from *that* inquiry everything else that demonstrated why the instruction surely did adversely affect the verdict. The government points to no other case where the prejudice from an instruction that never should have been given was assessed by completely ignoring that all participants (judge, prosecutor, and defense counsel) clearly understood at the time the instruction was given that the jury could use it as a separate and independent reason to convict. In the government's

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[3] The summation also expressly linked the failure-to-act theory to the conspiracy counts, dashing any possibility that the government might establish, beyond a reasonable doubt, that the instructional error had no adverse effect on those counts. *See* Pet. App. 130a-31a (arguing from failure-to-act evidence that petitioner "is just as responsible as [his wife] is for all of her actions" "under the law of conspiracy, and under the law of aiding and abetting"). As the prosecutor undoubtedly recognized, jurors are much more likely to convict of *conspiring* to violate a statute if they have already been misled into a rendering a guilty verdict for *violating* the statute.

game of "heads-we-win, tails-you-lose," only if the prosecutors "did *not* proceed on a failure-to-act theory" could the manner in which they actually tried the case figure into the determination whether the jurors undoubtedly realized that "the court's instruction on that point was extraneous." *See United States v. Bailey*, 405 F.3d 102, 110 (1st Cir. 2005) (emphasis added).

Not content with a rule that would shift away from the government its *burden* to disprove prejudice from the error it created, *cf. Gamache v. California*, No. 10-5196 (U.S. Nov. 29, 2010) (Sotomayor, J., concurring in certiorari denial) (emphasizing that lower courts must place the burden on the prosecution), the Solicitor General urges this Court to shift the *blame* for any prejudice to petitioner, who assertedly could have fixed things by objecting when the prosecutor urged conviction under the flawed theory. Opp. 10, 14, 16. But the error is not that the government argued for something the instructions did not allow; rather, it is that the judge had already ruled that the government *could* argue its primary theory without fear of defense opposition. The very purpose of the Rule 30 charge conference is to determine what may be argued *without* drawing an objection. *See, e.g., United States v. Pelullo*, 964 F.2d 193, 220 (3d Cir. 1992) (explaining that Rule 30, Fed. R. Crim. P., "require[s] the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury" (internal quotation marks omitted)). By overruling petitioner's objections to the failure-to-act instruction during that conference, the judge put petitioner on notice that he better be prepared to defend under *both* the affirmative-act *and* failure-to-act theories if he wanted to "intelligently argue the case to the

jury." *Id.* (internal quotation marks omitted). Petitioner was under no duty to magnify the instructional error by asking the judge to repeat during summation that petitioner could be convicted if the jury found he "stayed" in his house and "failed to do anything." Pet. App. 122a.[4]

4. This Court should grant review of both questions. The government says the second question is "not actually presented" (Opp. 19-20) because the Second Circuit refused to address it, and because the instruction told the jury that some kind of duty was required. This is a description of the error, not a reason to deny review. Because no legal duty applied *in this case* (the Second Circuit having rejected those that the government proffered), it was error to give the instruction. It is of no consequence that other cases might arise in which an omissions instruction, coupled with a charge that does define a real duty, would be proper.

The government never denies that the instruction common to the two questions comes from the leading jury-instruction treatise, concedes that the circuits addressing this issue have given weight to the instruction's pedigree when rejecting challenges based on the same failure-to-act language, and makes no effort to identify a federal criminal statute that prosecutors employ nearly as often as aiding-and-abetting. To be sure, only the government can

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[4] While it may be literally true that the court of appeals "considered" the possibility that the prosecutor's summation helped mislead the jury into convicting for failure to act (Opp. 15), the court's ruling that those failure-to-act arguments would receive no weight at all is not the type of consideration demanded by the Sixth Amendment. Pet. App. 38a (stating there was no "risk" for the summation to "heighten").

say whether there will be "a significant number of cases in which the government pursues aiding-and-abetting liability based on a failure to act in the absence of any legal duty." Opp. 20. But far from trying to assure the Court that this improper practice will come to an end (*cf.* Brief for the United States in Opposition at 5, *Tapia v. United States*, No. 10-5400 (U.S. Oct. 2010) (opposing review because "the government is in the process of informing" the appellate courts that it agrees with the petitioner's legal position)), the Solicitor General gives every reason to believe that future petitions challenging unlawful failure-to-act convictions will be greeted with its same "move along, nothing to see here" response.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ALAN M. DERSHOWITZ
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 496-2187

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioner Mahender Murlidhar Sabhnani

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